

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 6, 2005

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United States Postal Service
Case 12-CA-24496

530-6067-6001-3700
530-6067-6067-2300
530-6067-6067-5200
530-6067-6067-7100

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by refusing to provide the Union with a requested investigative memorandum while the Employer's disciplinary investigation was ongoing. We conclude that because releasing the memorandum could have jeopardized the Employer's investigation, the memorandum was confidential at that time and the Employer was privileged to withhold it from the Union until the investigation was over.

FACTS

The United States Postal Service (the Employer) Lincoln Annex Station in Clearwater, Florida was historically a postal distribution and sorting center. Around January 2005, the clerks at Lincoln Annex began handling collect on delivery (COD) parcels, which entailed handling cash. On March 14, 2005, postal clerk [FOIA Exemptions 6 and 7(c)] mistakenly handed a customer a COD parcel without collecting the full amount owed for the parcel. Thereafter, clerk [FOIA Exemptions 6 and 7(c)] issued a money order for the full amount owed for the COD parcel to the sender of the parcel. Because of the discrepancy between the amount of the money order and the amount of money collected, the Postmaster initiated a Postal Inspection Service fraud investigation. On March 21, [FOIA Exemptions 6 and 7(c)]ri filed a class action grievance alleging, inter alia, that the addition of COD functions at Lincoln Annex without adequate training and facilities violated certain articles of the collective-bargaining agreement between the Postal Service and the American Postal Workers Union (the Union).

Postal Inspector Kenneth Sweeney conducted the Postal Inspection Service investigation. Sweeney prepared an investigative memorandum dated April 22, 2005, with exhibits. The Postal Inspector does not make disciplinary recommendations. Upon receiving Sweeney's report on April

25, the Postal Service initiated an independent disciplinary investigation of the March 14 incident. The Postal Service conducts an independent investigation because arbitrators have held that the collective-bargaining agreement requires an independent disciplinary investigation by the Postal Service before an employee is disciplined. In cases in which management has not conducted an independent disciplinary investigation after the Postal Inspector's investigation, arbitrators have generally found a denial of grievants' rights to due process and have awarded some form of relief from discipline to the grievants.

On May 23, 2005, the Postal Service interviewed [FOIA Exemptions 6 and 7(c)] and [FOIA Exemptions 6 and 7(c)] separately. On several occasions prior to the investigatory interviews, the Union asked the Postal Service to provide Postal Inspector Sweeney's investigative memorandum and the attached exhibits. The Postal Service asserted that the requested documents were confidential and that the Postal Service had no obligation to give them to the Union until after management completed its independent investigation. On May 26, after the interviews, the Postal Service sent the requested documents to the Union.

The Region recommends that the General Counsel issue a Section 8(a)(5) complaint, absent settlement, attacking the Postal Service's policy of not disclosing the Postal Inspectors' investigative memoranda and exhibits until after the Postal Service has completed its disciplinary investigation.¹

ACTION

We conclude that because releasing the investigative memorandum and exhibits could have jeopardized the Postal Service's ongoing disciplinary investigation, the documents were confidential at that time and the Employer was privileged to withhold them from the Union until the investigation was over. Thus, the Region should dismiss the charge, absent withdrawal.

A union is generally entitled to information that is relevant to its collective-bargaining responsibilities.² The Board uses a liberal standard in judging whether

¹ The Region would not attack the Employer's failure to provide any documents which qualify as witness statements under Anheuser-Busch, 237 NLRB 982, 984-985 (1978).

² See NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967).

requested information is relevant.³ However, where the requested information is arguably confidential, the interest in maintaining that confidentiality and the interest of the union in representing unit employees must be balanced.⁴ In Detroit Edison, the Supreme Court held that an employer did not violate Section 8(a)(5) by refusing to provide the union with employee scores on aptitude tests without the affected employees' consent, even though the union had requested that information for the purpose of processing a grievance. The Court concluded that the employer's good faith offer to disclose "sensitive" information to the union on the condition that the affected employees consented to such disclosure was a reasonable accommodation of the union's need for the data, since obtaining the consent of employees it was representing placed only a "minimal burden" upon the union.⁵

Here, the Postal Inspector's report was clearly relevant. Reviewing the investigative memoranda and exhibits would have allowed the Union to better prepare for the then upcoming Weingarten⁶ interviews of [FOIA Exemptions 6 and 7(c)] and [FOIA Exemptions 6 and 7(c)] by the Postal Service.

However, there is a legitimate confidentiality concern regarding the timing of the disclosure of these documents. Requiring disclosure of a Postal Inspector's report prior to Weingarten interviews may impede the Postal Service's ongoing disciplinary investigation. Once the Postal Service's investigative file is made available to the Union and the affected employee, it would become more difficult for management to assess credibility and reach the truth during an investigative interview. Further, disclosure during an investigation could also compromise other investigative avenues available to the Postal Service.

Since the information would be confidential at least while the investigation is ongoing, a balance must be struck between that interest and the Union's interest in obtaining the information, and an accommodation must be made. We conclude that the Postal Service's interest in maintaining confidentiality throughout the investigation outweighs the Union's need for the information in preparing for Weingarten

³ Acme, 385 U.S. at 437.

⁴ Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

⁵ 440 U.S. at 319.

⁶ 420 U.S. 251 (1975).

interviews. The Board has been reluctant to order the disclosure of requested information where its release could jeopardize an ongoing investigation. In Postal Service,⁷ despite being relevant to a pending grievance, the Postal Service was justified in refusing to provide the union with the names of confidential informants and audio and video tapes of drug transactions because "disclosure might impair the ongoing investigations which may have been begun as a result of the current investigation." Further, in IBM Corporation,⁸ the Board, in declining to extend the reach of Weingarten, reiterated its concern about interfering with "an employer's ability to conduct an effective internal investigation." Here, in light of the Postal Service's interest in insuring fiscal integrity, the effectiveness of its ongoing disciplinary investigations is critically important. Finally, the Postal Service's offer to provide the information after management completes its disciplinary investigation was a reasonable accommodation of the Union's need for the data.⁹ The Weingarten interview is not a trial and the Union representative's role at the interview is relatively limited.¹⁰ Thus, participating in the interview without reviewing the Postal Service's investigatory file imposes only a minimal burden on the Union.¹¹ Under these circumstances, the Postal Service did not violate the Act by

⁷ 306 NLRB 474, 477 (1992).

⁸ 341 NLRB No. 148, slip op. at pp. 4-6 (2004).

⁹ We conclude that the Postal Service was not obligated to bargain further regarding an accommodation. The accommodation offered by the Postal Service was the only reasonable accommodation, given the potential harm in releasing any investigative materials in any form during an ongoing disciplinary investigation. Thus, further bargaining was unnecessary.

¹⁰ New Jersey Bell Telephone Co., 308 NLRB 277, 279-280 (1992) (the "permissible extent of participation ... is seen to lie somewhere between mandatory silence and adversarial confrontation," quoting Postal Service, 288 NLRB 864, 867 (1988)).

¹¹ The fact that the requested information was also relevant to the pending class action grievance filed by Letteri does not alter the balance. The threat to the integrity of the ongoing Postal Service investigation from disclosure trumps the Union's need for the information to process the related grievance. See Postal Service, 306 NLRB at 477. Further, the Union received the requested information after only a short delay.

refusing to provide the information until its internal investigation was completed.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.